

The Honorable John H. Chun

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC., *et al.*,

Defendants.

No. 2:23-cv-0932-JHC

**AMAZON.COM, INC.'S SURREPLY
IN OPPOSITION TO PLAINTIFF'S
MOTION TO DESEQUESTER
DOCUMENTS CLAWED BACK BY
DEFENDANT**

**NOTED ON MOTION CALENDAR:
August 4, 2023**

On October 17, 2023, the Court inquired as to whether 16 C.F.R. § 2.11(d)(1)(ii)(b) provides a procedural basis for the FTC's pending Motion to Desequester. It does not. The FTC's Motion to Desequester is procedurally improper and should be denied.

Section 2.11 is part of the "rules governing the processes of [FTC] investigations." 77 Fed. Reg. 59294-01, *59295 (Sept. 27, 2012). It provides that the FTC must sequester privileged documents obtained during an FTC investigation "until such time as an Administrative Law Judge or court may rule on the merits of the claim of privilege or protection in a proceeding or action resulting from the investigation." Section 2.11 thus requires the FTC to sequester documents unless and until Amazon's privilege assertions are overruled by an Administrative

1 Law Judge or Court. Critically, Section 2.11 does not specify a procedure for the FTC to obtain
 2 such a ruling—much less independently grant that authority.¹

3 The FTC’s investigation of Amazon is over, and therefore there is no live controversy
 4 regarding sequestration and no basis for this Court to apply or consider Section 2.11. Rather, the
 5 only live controversy between the parties is civil litigation initiated by the FTC in this Court.
 6 Accordingly, the Federal Rules of Civil Procedure, which “govern the procedure *in all civil*
 7 *actions and proceedings* in the United States district courts,” and the Local Rules of this court
 8 control. Fed. R. Civ. P. 1. (emphasis added).

9 Under the FTC’s expansive interpretation, Section 2.11 would trump the Federal Rules of
 10 Civil Procedure, including by eliminating all meet and confer and timing requirements for
 11 discovery disputes. *See, e.g.*, Fed. R. Civ. P. 37(a)(1) (requiring moving parties to “include a
 12 certification that the movant has in good faith conferred or attempted to confer with the person or
 13 party failing to make disclosure or discovery in an effort to obtain it without court action”).
 14 There is no basis for the FTC’s interpretation: Amazon has not identified any authority to
 15 support the use of Regulatory Provision 2.11 to circumvent the Federal Rules as the FTC
 16 proposes doing here, and has not identified any other examples of a similar “Motion to
 17 Desequester.” Moreover, courts in this Circuit have explicitly held that regulations do not trump
 18 the Federal Rules of Civil Procedure. Rather, “in the Ninth Circuit, the Federal Rules of Civil
 19 Procedure generally trump [conflicting] regulations.” *Newton v. American Debt Services, Inc.*,
 20 2014 WL 2452743, *3 (N.D. Cal. 2014).

21
 22
 23 ¹ An entirely separate regulatory provision—16 C.F.R. § 2.13(a)—provides a dispute resolution process for “failure
 24 to comply with Commission compulsory processes.” Pursuant to Section 2.13(a), the FTC has taken the position
 25 that “[p]roceedings to enforce administrative compulsory process . . . are properly instituted by a petition and order
 26 to show cause.” Dkt. 36-1, FTC’s Memorandum ISO Petition to Enforce Match Civil Investigative Demand at 6,
FTC v. Match Group, Inc., No. 1:22-mc-00054 (D.D.C. June 16, 2023). The FTC elected not to take such action
 during the course of its investigation and Section 2.11 provides no basis to override both the Federal Rules of Civil
 Procedure and the regulation’s dedicated enforcement mechanism.

1 To be sure, this Court might ultimately be called on to resolve the privilege disputes
2 raised in the FTC's Motion to Desequester. Indeed, the FTC has served parallel document
3 requests seeking production of the 54 documents at issue in the Motion. Amazon is eager to
4 assist the Court in efficiently resolving this and all discovery disputes. But § 2.11 is not the
5 proper procedural vehicle for the FTC to raise a discovery dispute in ongoing civil litigation.

6
7 DATED this 20th day of October, 2023.

8
9 I certify that this memorandum contains 593 words, in compliance with the Court's
10 Order, Dkt. 81.

11 DAVIS WRIGHT TREMAINE LLP

12
13 By s/ Kenneth E. Payson

Kenneth E. Payson, WSBA #26369
James Howard, WSBA #37259
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: kenpayson@dwt.com
jimhoward@dwt.com

18 COVINGTON & BURLING LLP

19 Stephen P. Anthony*
20 Laura Flahive Wu*
21 Laura M. Kim*
22 John D. Graubert*
23 850 Tenth Street, NW
24 Washington, DC 20001
25 Telephone: (202) 662-5105
26 E-mail: santhony@cov.com
lflahivewu@cov.com
lkim@cov.com
jgraubert@cov.com

27 AMAZON.COM, INC.'S SURREPLY IN OPPOSITION
TO PLAINTIFF'S MOTION TO DESEQUESTER
DOCUMENTS CLAWED BACK BY DEFENDANT
(2:23-cv-0932-JHC) - 3
4892-7901-4281v.1 0051461-005818

Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main · 206.757.7700 fax

John E. Hall*
415 Mission Street, Suite 5400
San Francisco, CA 94105
Telephone: (415) 591-6855
E-mail: jhall@cov.com

Megan L. Rodgers*
3000 El Camino Real
Palo Alto, CA 94306
Telephone: (650) 632-4734
E-mail: mrodgers@cov.com

HUESTON HENNIGAN LLP

John C. Hueston*
Moez M. Kaba*
Joseph A. Reiter*
523 West 6th Street, Suite 400
Los Angeles, CA 90014
Telephone: (213) 788-4340
E-mail: jhueston@hueston.com
mkaba@hueston.com
jreiter@hueston.com

**admitted pro hac vice*

Attorneys for Defendant
AMAZON.COM, INC.